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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PAYMAN BORHAN,

Plaintiff and Appellant,

v.

LISA M. BASSIS,

Defendant and Respondent.

B282789

(Los Angeles County
Super. Ct. No. BC605133)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Mel Red Recana, Judge. Affirmed.

Payman Borhan, in pro. per., for Plaintiff and Appellant.

Law Offices of Cole & Loeterman and Dana Cole for
Defendant and Respondent.

Appellant Payman Borhan (appellant) is a state prisoner serving an indeterminate term of 15 years to life following his conviction on two counts of lewd acts with a child under 14 years of age. (Pen. Code, § 288, subd. (a).) Appellant appeals from a judgment entered after the trial court sustained a demurrer to appellant's complaint against his former attorney, Lisa Bassis (respondent) without leave to amend.¹ The operative complaint alleged causes of action for professional negligence, intentional tort, fraud, breach of contract, and breach of fiduciary duty. The trial court found the causes of action for negligence, breach of contract, breach of fiduciary duty, and intentional tort to be time barred. Alternatively, these causes of action failed because appellant failed to allege factual innocence. The court further found that appellant had not stated a cause of action for actual fraud because he failed to allege with particularity a misrepresentation or reliance. The demurrer was sustained without leave to amend. Finding no error, we affirm.

BACKGROUND

Respondent's representation of appellant

In December 2002, appellant was convicted of the crimes for which he is presently incarcerated. The sentencing hearing took place in March 2003. Respondent did not represent appellant in the criminal trial. She was hired in September 2005 to file a petition for writ of habeas corpus in the United States District Court for the Central District of California arising from appellant's state court conviction.

¹ Though the opening brief includes the name of Zahra Nafez as a self-represented party, Ms. Nafez did not sign the notice of appeal or the civil case information statement filed with this court. As she has not otherwise appeared in this case, she is not included in this appeal.

The petition was filed in the Central District in October 2006. In July 2007, the attorney general filed a motion to dismiss the petition on timeliness grounds. After additional briefing, on October 12, 2007, the district court issued an order finding the petition timely. On October 19, 2007 the attorney general filed a request for reconsideration. On January 15, 2008 the district court reversed itself and recommended dismissal of the action on timeliness grounds. On January 17, 2008 a judgment was entered dismissing appellant's petition for writ of habeas corpus with prejudice.

Subsequently, respondent filed a motion to vacate the judgment as well as a notice of appeal and request for certificate of appealability (COA). The district court and the Ninth Circuit Court of Appeals both denied the request for COA.

On November 21, 2008, respondent wrote to appellant advising him that her services had concluded and she was returning his file.

Appellant's prior proceedings against respondent

While the above proceedings were pending, appellant was seeking relief from the dismissal of his petition on the grounds of respondent's incompetence. On October 10, 2007, he filed in the district court a document entitled "Supplemental Objection to the Recommendation of the Magistrate Judge," in which he sought to bring counsel's alleged errors to the attention of the court. After the Ninth Circuit affirmed the dismissal of the petition, he filed six motions for relief from judgment under rule 60(b) of the Federal Rules of Civil Procedure (Rule 60(b)). In a March 27, 2009 Rule 60(b) motion, he admitted that counsel's alleged errors were known to him at the time he filed the October 10, 2007 supplemental objection.

In 2010, the United States Supreme Court decided *Holland v. Florida* 560 U.S. 631, 652, which held that egregious attorney

misconduct could be a ground for equitable relief from the statute of limitations. In his final Rule 60(b) motion, appellant contended that he was the victim of abandonment and egregious attorney misconduct by respondent. The district court denied the motion on the ground that the simple miscalculation at issue was not the type of extraordinary circumstances justifying relief under Rule 60(b).

Appellant sought relief in the Ninth Circuit Court of Appeals. On July 6, 2011, the Ninth Circuit granted appellant's request for a COA. On August 15, 2013, the Ninth Circuit vacated the district court's judgment and remanded for an evidentiary hearing on the claim that appellant was entitled to equitable tolling based on respondent's alleged misconduct.

The hearing was held on February 25, 2014. Appellant was represented by a federal public defender, and the prison warden, who was the nominal opposing party in the habeas proceeding, was represented by the attorney general. Respondent was not a party to the action, was not afforded the right to be heard, and was not afforded the opportunity to present evidence and argument. She was excluded from the proceeding. On October 9, 2014, the district court rendered its decision that appellant was entitled to equitable tolling due to respondent's alleged misconduct. Appellant's habeas petition was reinstated and his claims were fully litigated on the merits.

On May 8, 2017, the habeas petition was denied and judgment entered dismissing the action with prejudice.

On December 23, 2010, appellant filed his first claim for legal malpractice against respondent in *Borhan v. Bassis*, Los Angeles Superior Court case No. SC110846. On December 12, 2011, the case was dismissed for failure to prosecute.

PROCEDURAL HISTORY

Appellant filed this action for legal malpractice on December 22, 2015, with causes of action for professional negligence and breach of contract. A first amended complaint was filed on May 16, 2016, and the operative second amended complaint (SAC) on June 1, 2016. The SAC alleged causes of action for professional negligence, intentional tort, fraud, breach of contract, and breach of fiduciary duty.

On November 4, 2016, respondent filed a demurrer, motion to strike, and request for judicial notice. The matter was heard on April 20, 2017. After granting respondent's request for judicial notice, the court heard argument. Following argument, the court adopted its tentative order as the order of the court, sustaining the demurrer without leave to amend as to all causes of action.

The court set out its rationale in a detailed written order. As to appellant's first, second and fourth causes of action for negligence, intentional tort, breach of contract or breach of fiduciary duty, the court found that they were all based on the same essential facts involving professional negligence. Because the acts had occurred in 2009, they were barred by the one-year statute of limitations found in Code of Civil Procedure section 340.6, subdivision (a). Furthermore, the court found that in order to bring a legal malpractice claim, appellant was required to show proof of actual innocence. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1200.) Appellant failed to allege that he was factually innocent. For this additional reason, no causes of action were properly stated.

As to the third cause of action for fraud, the court noted that the alleged misrepresentations were "going back to state courts was futil[e]"; 'there was no hope of success in the 9th circuit . . .'; a '60(b) motion was unavailable . . .'; and she was

[appellant's] attorney in 2014.” The court found that, “[t]o the extent that [respondent] made any misrepresentations, [appellant] ha[s] not alleged [his] reliance.” Alternatively, the court held that legal advice is not actionable as misrepresentation. (Citing *Haviland v. Southern California Edison Co.* (1916) 172 Cal. 601, 609.) Finally, the court held that appellant had not been damaged by respondent’s alleged actions.

The court found that appellant did not appear to be reasonably capable of amending his complaint to state a cause of action against respondent for professional negligence.

On May 23, 2017, appellant filed his notice of appeal.

DISCUSSION

I. Applicable law and standard of review

When reviewing a trial court’s order sustaining a demurrer without leave to amend, we apply well-established rules of review. “A demurrer tests the legal sufficiency of the complaint. [Citation.] Therefore, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.”. . .’ [Citations.]” (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173.)

Where, as here, the trial court has sustained a demurrer without leave to amend, “we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

II. The claims are barred as a matter of law

A. *All causes of action are based on professional negligence*

All of appellant's causes of action are based on appellant's underlying claims of legal malpractice. All claims, regardless of the specific theory pled, arise from the same set of facts concerning respondent's representation of appellant and alleged professional negligence. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 65 (*Quintilliani*)). Appellant makes no argument to the contrary.

As the *Quintilliani* court explained: “An injury suffered by reason of a defendant's conduct gives rise to a single cause of action, regardless of how many theories are pled by the complaint. [Citation.] Where the injury is suffered by reason of an attorney's professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract. [Citations.]’ [Citation.]” (*Quintilliani, supra*, 62 Cal.App.4th at p. 65.)

This rule is applicable wherever the “primary right involved in all of appellant's claims is ‘the right to competent legal representation.’ [Citation.]” (*Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1190 (*Khodayari*)). In *Khodayari*, the appellant's claims for fraud, intentional misrepresentation, concealment, deceit, constructive fraud, negligent misrepresentation, negligence, breach of fiduciary duty, intentional infliction of emotional distress, abuse of process, breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Business and Professions Code all involved the primary right to competent legal representation. Thus, “for application of the actual innocence requirement, all [were] properly characterized as claims for legal malpractice.” (*Ibid.*)

Because the causes of action alleged in this matter arise from the same factual allegations, all such claims are governed by the same rules regarding legal malpractice claims.

(*Khodayari, supra*, 200 Cal.App.4th at p. 1190; *Quintilliani, supra*, 62 Cal.App.4th at p. 65.)

B. The claims are barred due to appellant's failure to show proof of actual innocence

When a criminal defendant sues his or her attorney for legal malpractice arising from a criminal conviction, actual innocence is a necessary element of the cause of action. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 534.) “Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury.” (*Id.* at p. 539.) An individual convicted of a criminal offense “must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action.” (*Coscia v. McKenna & Cuneo, supra*, 25 Cal.4th at p. 1201.) Causes of action based on legal malpractice arising out of a criminal conviction are properly subject to demurrer where the plaintiff has failed to show actual innocence and obtain postconviction exoneration. (*Khodayari, supra*, 200 Cal.App.4th at pp. 1186-1187.)

Appellant has neither shown actual innocence, nor has he obtained postconviction exoneration. Thus, the trial court properly sustained respondent's demurrer to all causes of action.

C. The claims are barred by the statute of limitations

As set forth above, all causes of action in the SAC sound in legal malpractice. As such, they are all subject to the limitations period set forth in Code of Civil Procedure section 340.6, which is the limitations period applicable to claims for legal malpractice arising out of the performance of an attorney's professional duties. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223

Cal.App.4th 1105, 1121.) “Section 340.6 states two distinct and alternative limitation periods: One year after actual or constructive discovery, or four years after occurrence (the date of the wrongful act or omission), whichever occurs first.” (*Prakashpalan*, at p. 1121.) Discovery of the negligent act or omission generally initiates the one-year statutory period. (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2).

The record shows that appellant knew of respondent’s alleged malpractice as early as October 10, 2007, the date he filed a document entitled “Supplemental Objection to the Recommendation of the Magistrate Judge,” in the district court and he sought to bring counsel’s alleged errors to the attention of the court. Further, on January 17, 2008 a judgment was entered dismissing appellant’s petition for writ of habeas corpus with prejudice. These events triggered appellant’s imputed knowledge of respondent’s alleged malpractice.

On November 21, 2008, respondent wrote to appellant advising him that her services had concluded and she was returning his file. Insofar as appellant did not already have knowledge, the return of his file gave appellant additional opportunity to discover the alleged malpractice.

The record thus supports the trial court’s decision that the causes of action are barred by the one-year statute of limitations set forth in section 340.6.

III. Appellant failed to state a claim for actual fraud

Actual fraud is governed by Code of Civil Procedure section 338, subdivision (d), which provides a three-year limitations period. Thus, if appellant set forth a claim of actual fraud, it would be governed by a different statute of limitations. However, “[t]he statute of limitations to be applied is determined by the nature of the right sued upon, not by the form of the action or the relief demanded. [Citations.]” (*Day v. Greene* (1963) 59 Cal.2d

404, 411.) Appellant's cause of action for fraud is based on respondent's representation of him, thus is properly analyzed as a claim for legal malpractice. (*Khodayari, supra*, 200 Cal.App.4th at p. 1190; *Quintilliani, supra*, 62 Cal.App.4th at p. 65.)

The elements of fraud, which give rise to a tort action for deceit, are (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud or induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Fraud must be pled specifically; general and conclusory allegations do not suffice. (*Id.* at p. 645.) Consequently, "a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.)

Appellant has not stated a claim for fraud. Appellant alleges that he hired respondent to file a habeas petition in federal court. He claims she did so in the wrong court and the writ was denied for late filing. Appellant states that he has been denied the opportunity to bring up respondent's "fraudulent and concealing acts," but does not describe such acts or statements. In his reply brief, appellant describes a rush to charge his mother fees, but then an absence of action for the subsequent 12 months. No misrepresentation or omission is laid out with particularity. He also refers to a purported statement that a Rule 60(b) motion "is not an option." To the extent that such a statement may be considered fraud, appellant cannot show reliance on the statement as he did, in fact, file numerous Rule 60(b) motions. Appellant further alleges that respondent forged his signature and presented it to prison authorities and the attorney general. Again, appellant fails to allege a specific misrepresentation made

to him, the nature of his reliance on any such statement, or the resulting harm.

For the alternative reason that appellant failed to allege with particularity his claim for fraud, the demurrer as to that cause of action was properly sustained.

IV. The meet and confer requirement is inapplicable and does not negate the demurrer

Appellant argues that the judgment should be reversed because respondent failed to comply with obligations to meet and confer. However, a court is not required to overrule a demurrer based on noncompliance alone. (Code Civ. Proc., § 430.41, subd. (a)(4) [“Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer”].) Further, the requirement is inapplicable where one of the parties “not represented by counsel is incarcerated in a local, state, or federal correctional institution.” (§ 430.41, subd. (d)(1).)

Respondent was not obligated to engage in the meet and confer process outlined in Code of Civil Procedure section 430.41, and even if she were, her failure to do so does not provide sufficient grounds to reverse the judgment.

V. The demurrer was properly sustained without leave to amend

In order to establish an abuse of discretion in denying leave to amend, appellant must show “a reasonable possibility that the defect[s] can be cured by amendment.” (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1550.) Appellant sets forth no facts showing that he can cure the defects in the complaint. Thus, appellant cannot plead viable claims. The trial court did not abuse its discretion in so holding.

DISPOSITION

The judgment is affirmed. Each side to bear their own costs of appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST